Nos. 87-253, 87-431, 87-462 and 87-775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

v.

CHAN KENDRICK, et al.,
Appellees.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

v.

CHAN KENDRICK, et al.,
Appellees.

CHAN KENDRICK, et al.,
Cross-Appellants,

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES
Cross-Appellee.

UNITED FAMILIES OF AMERICA,
Appellant,

v.

CHAN KENDRICK, et al.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE

NOW Legal Defense and Education Fund,
National Abortion Rights Action League
(List of Amici continued on inside front cover)

IN SUPPORT OF APPELLEES AND CROSS-APPELLANTS

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INTEREST OF AMICI CURIAE

The interest of the amici curiae are set forth in Appendix B attached to this brief.[1] Amici curiae are deeply concerned about the governmental promotion of religion and by the discrimination among religions built into the federal Adolescent Family Life Act. Amici are also concerned that the AFLA restricts and coerces women in their reproductive decisionmaking by silencing educational and health care professionals who would otherwise provide young women and their parents with full and accurate information about women's options with respect to contraception and abortion. This restriction and coercion affects poor

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[1] The interests of each amicus curiae are set forth in detail in Appendix B. In accordance with Rule 36.2 of the Rules of this Court, amici file this brief with the consent of all parties. Letters of consent, facsimiles of which appear in Appendix A, are being filed with the Clerk of the Court.

women particularly harshly.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case as set forth by the appellees and cross-appellants Kendrick, et al., in whose support amici file.

SUMMARY OF ARGUMENT

The issue before the Court is whether the Adolescent Family Life Act ("AFLA"), designed to involve religious groups, community groups, and families in teaching and counseling programs to curb sexual activity and pregnancy among adolescents, can pursue these goals by forbidding funded groups to provide, directly or indirectly, abortion counseling or referral without establishing religion. Amici curiae support and adopt the arguments set forth by appellees and cross-appellants Kendrick et al., urging affirmance of the district court's finding that the AFLA is unconstitutional on

establishment clause grounds, and seek to highlight that the AFLA grantees' provision of "prevention" and "care" services has involved and continues to involve[2] religiously-guided teaching and inculcation of religious doctrine.

Amici curiae also urge affirmance on alternative grounds, see Bankers Ass'n v. Shultz, 416 U.S. 21 (1974), free speech and due process, because the AFLA is designed to steer adolescent participants as they exercise their fundamental rights in reproductive decisionmaking by silencing "prevention" and "care" service providers and censoring the information with which adolescent participants make decisions. Accordingly, amici urge this

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[2] Amici curiae have lodged with this Court ten (10) copies of published documents obtained from current AFLA grantees together with affidavits authenticating the sources of the documents. Those documents are referred to herein as L.D. ("Lodged Documents") followed by the appropriate page number as they appear in the lodged document.

Court to strike down the statute as a whole, not just sever the portions of the AFLA involving religious groups.

ARGUMENT

The central issue before the Court is whether government funding of religious organizations to disseminate information inspired by religious doctrine is unconstitutional.[3] The information delivered through the program concerns a topic that all parties to and participants in this case agree is of great public importance -- the sexual activity and reproductive decisionmaking of adoles-

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[3] Ancillary to, but part of, that issue is the impossibility of severing the language which unconstitutionally affiliates government with religious organizations from the remainder of the statute, since the entire statute was conceived and executed expressly to teach morals and values. See Brief of Appellees and Cross-Appellants Kendrick et al. For a full discussion of the establishment clause case law and issues implicated in this case, amici curiae refer this Court to the Brief of Appellees and Cross-Appellants Kendrick et al.

cents. The information provided through the Adolescent Family Life Act, 42 U.S.C. Sec. 300z et seq., is intended to and very likely does form an important basis for the major reproductive and life decisions of its teenage program participants. The statute, however, expressly precludes the funding of any speech in the nature of abortion counseling, or referral,[4] and requires funded speech, among other things, to discourage use of contraception and to encourage adoption over other responses to teen pregnancy. The result is a silencing of abortion-related speech by any AFLA service provider, even with respect to activities not funded by the AFLA, and the provision of distorted, inaccurate and un-

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[4] Specifically, the statute restricts funding as follows: "[g]rants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortion or abortion counseling or referral." 42 U.S.C. Sec. 300z-10a.

balanced "information" to young women and their parents. This statutorily mandated omission of information amounts to misinformation, and distorts the ability of young women to make critical reproductive life decisions in consultation with their physicians and parents. Thus, the statute impinges upon the constitutional rights of free speech, thought and privacy of the program's potential service providers and adolescent participants.

I. THAT CURRENT GRANTEES, LIKE GRANTEES EXAMINED AT TRIAL, ARE PROMOTING RELIGION DEMONSTRATES THE CONSTITUTIONAL DEFECT INHERENT IN THE STATUTE.

In certain kinds of government programs, it is possible for religiously-affiliated groups to provide purely secular services without the unconstitutional promotion of religious doctrine; in such circumstances religious organizations should stand on an equal footing with secular service providers

having no religious connections. The AFLA is not such an endeavor. The AFLA, by its very terms, requires the government to place its seal upon particular religious doctrines.

The record starkly demonstrates that the speech of religious organizations involved in the initial AFLA demonstration program is inspired by religious doctrine. By requiring involvement of religious organizations but precluding abortion counseling or referral by grantee service providers, directly or indirectly, the AFLA selects those religions which forbid even the contemplation of abortion.[5] For such religions, abortion is

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[5] While the religions funded under the AFLA teach that full personhood exists from the moment of conception and develop their teachings on that doctrine, this Court has appropriately held that government may not advocate one theory of when life begins. Roe v. Wade, 410 U.S. 113, 159-62 (1973). Nor may the state constitutionally assert an interest that grants the fetus a status equivalent to that of the woman. By selectively funding organizations which adhere to the conviction that developing embryos should have the same legal protections as born persons, the federal

never discussed in any positive or even neutral terms in either the devotional or the service context. It is no accident then that, as the record shows, AFLA funding has flowed to select religious groups -- Catholic, Mormon, Fundamentalist -- but not others. The result is governmentally funded, doctrinally approved coercion of young women.

For example, the employees of Catholic grantees are bound by Church doctrine that periodic sexual abstinence in marriage is virtuous, and that extramarital sex, contraceptives and abortion are evil.[6] The Catholic ideal is that a woman has a duty to sacrifice her interests for those of an embryo or fetus.[7] Similarly, "[f]or the fundamentalist, God is the cause and power of all that is and God governs all natural processes. Therefore, not only is the conceptus regarded as of equal value and personhood with the woman, but conception is viewed as the consequence of an Act of God." J.A. 594 (Simmons Affirmation). A woman then is not seen as a participant in her fate, but rather as the passive vehicle through which the

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government has done indirectly that which it is prohibited from doing directly: it has placed its "power, prestige and financial support," see Engel v. Vitale, 370 U.S. 421, 431 (1962), behind a particular theory of human existence. The government's direct support of this religious belief is not merely incidental to its adoption of a secular policy; rather, the federal government has chosen to fund certain religious groups specifically because of their anti-abortion beliefs, and not merely in spite of them. See Sec. 300z(10)(a).

[6] Pope Paul VI, Humanae Vitae 225-27, 229, 231 (July 25, 1968)(encyclical on the regulation of birth), as published in The Papal Encyclicals 1958-1981 (C. Carlen Ihm ed. 1981); Ethical and Religious Directives for Catholic Health Facilities, J.A. 550. (Appendix A to Maisenbacher Affirmation).

[7] One study guide for a film used in an AFLA Catholic Family Services program stated: "The unwed mother is a person in need and calls us to be compassionate, as Christ was. She is also a sign of hope, witnessing to the fact that the life of her child is worth personal sacrifice." J.A. 559.

divine will is manifested. The issue is not, of course, the validity of these religious views, which this Court is not permitted to determine.[8] The point is, however, that the government may not constitutionally enforce these views on women.

Although many of the AFLA-sponsored seminars and counseling sessions explicitly refer to "God," religious doctrines and

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[8] Amici curiae certainly do not argue that, when unaided by government funding, such groups may not advocate their religious views. These and all other religious organizations are entitled not only to hold freely their beliefs, but to have those beliefs respected by all instruments of government. Indeed, historically, the first amendment protected from government intrusion and coercion those very religious groups now being funded. The establishment clause "embodie[s] the Framers' conclusion that government and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other." Abington School District v. Schempp, 374 U.S 203, 259 (1963). See also Everson v. Board of Educ., 330 U.S 1, 15-16 (1947).

religious affiliations,[9] they need not mention religious words like "God" or "sin" to convey

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[9] See, e.g., L.D. 67 (Current AFLA grantee, Pregnancy Helpline, provides clients with a brochure called "The Life Rosary," which states: "Mary and Joseph were distressed to have lost Jesus in the temple. Many who come to us are distressed because they have lost or never found Christ. May each young woman who comes to us find Him through our counseling, help, and prayers."); L.D. 14 (Current AFLA grantee Christian Family Care Agency calls on young pregnant AFLA program participants to "[p]ray with us for: God's will for your family with regard to the child He has for you; Wisdom for our staff as we serve the children and families God sends us."); L.D. 57 (Current AFLA grantee, The Pregnancy Distress Center, instructs its counselors to "share God's plan for sex in marriage . . ." with its clients); L. D. 72 (Current AFLA grantee, A Woman's Choice, recommending that "[w]hen a person who is tempting comes around, start talking about Jesus Christ"); J.A. 36-37 (St. Ann's Infant and Maternity Home's manual instructing parents that "Sexuality is one of God's greatest gifts" and urging them "to find peace and strength in a full sacramental life with the Christ who loves them"); J.A. 551 (St. Margaret's employee handbook stating that it is a "Christian institution," providing medical care "in harmony with the teaching of the Catholic Church," and that each person is "a child of God [from] the very moment of conception").

religious ideology.[10] For example, current AFLA grantee, the Pregnancy Distress Center of Columbus, Ohio, features a "Psychological Profile of Women Seeking An Abortion." For the "neurotic," the Center encourages counselors to "stress fetal development and prayer assignment." For the woman with a "character disorder," the Center claims that "these disorders are a result of repeated broken relationships ... Use any argument you can--don't worry about causing guilt feelings--you won't." L.D. 56. (emphasis added). Perhaps the worst establishment clause violation occurs when the young person and his

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[10] See, e.g., J.A. 572 (the objectives of AFLA-funded "Here's Life Washington" program are "[t]o promote a lifestyle based on Biblical principles" through "[i]ndividual counseling based on Scriptural principles"); J.A. 284 (Deposition of John D. Hartum) (stating that he "based [the AFLA-funded program] all on Jesus Christ" because "That's the way I do things ..."); J.A. 390 (Christian Sexuality Program "whose goal is to develop and disseminate an educational program based on the teachings of the Catholic Church").

or her parents hear government-funded "teaching" or "medical advice" that includes these the same religious messages but fails to acknowledge that the teaching emanated from and may be distorted by the views of a religious source. See pp. 30-31 infra (recounting information provided by St. Margaret's and Families of the Americas Foundation).

The examples of religious indoctrination shown in the record are not just a few "abuses" in the early stages of the program's implementation as the appellant would have this Court believe. See Brief of Appellant Bowen, at 36 n.30 & 41. This is made clear by the conduct of current AFLA grantees.[11] For example, on a recent visit to

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[11] See generally the lodged documents referred to in note 2 supra. The appellant argues that religiously affiliated grantees do not promote religion by complying with the AFLA's abortion restrictions because "the statute itself imposes the same restriction on the funded programs." Brief of Appellant

the Pregnancy Distress Center of Columbus, Ohio, one woman was told by the counselor to open her heart to God referred to a local church for more counseling. L.D. 28. In fact, the Pregnancy Distress Center of Columbus, Ohio, which recently received $119,135 in AFLA funds,[12] states in its counseling manual: "When counseling girls and women considering an abortion, sometimes we have the opportunity to share our faith with them and urge them to let God be a part of

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Bowen, at 33. First, this argument falsely assumes that the "secular" nature of the funded activity is severable from the religious convictions of those providing the services, and thus assumes that the abortion restriction is not on its face tantamount to promotion of certain religious tenets. Secondly, it ignores the fact that through the AFLA, religious organizations have been and continue to be granted an open license to provide services and counseling in furtherance of their religious missions. The documents lodged with this Court herewith illustrate this point.

[12] L.D. 109-10 (list of current grantees and amounts awarded, as announced by the U.S. Department of Health and Human Services on November 5, 1987).

this important decision." See L.D. 55. The manual continues by suggesting that counselors suggest to clients: "If Jesus were sitting right here, would He tell you that it's alright to have an abortion?" Id. Clearly, the AFLA's problem of religious establishment has not been cured.

That not all AFLA grantees are religious organizations does not save the program; the statute was intended to and does encourage all grantees to talk about moral values. This has resulted in a particularly pernicious version of government involvement in religion in the case of at least one current AFLA grantee. As one affiant described a visit to receive pregnancy counseling at "A Woman's Choice" in Vienna, Virginia, the counselor ascertained the counselee's religion (Jewish) and proceeded to read her an article by a rabbi. While the article did not say that the Jewish faith disapproved of abortion, the counselor

implied that it did and used other religious references and terminology to pressure the counselee not to terminate the pregnancy. L.D. 69. There was no indication that "A Woman's Choice" had any affiliation with the Jewish faith. The strategy of this AFLA grantee was fully consistent with the AFLA's design and purpose. The misrepresentation of religious tenets and exploitation of the counselee's faith to serve the AFLA's end demonstrates dramatically the damage that the AFLA has done and will do if it is permitted to stand.

II. THE AFLA TRAMMELS THE FREE SPEECH AND PRIVACY RIGHTS OF THOSE HAVING CONTACT WITH THE PROGRAMS.

The AFLA was designed to alter the terms of the public discourse on the issues of adolescent sexual activity, reproductive health, contraception and abortion. It is intended to bring about a change in the

behavior of young people by silencing the educators, counselors, community leaders, and medical professionals who are willing openly and accurately to discuss adolescent sexuality and reproductive health, including contraception and abortion, and by amplifying with government funding the voices of those who promise not to discuss these critical issues.

A. By Its Very Terms, Section 300z-10 Requires Viewpoint-based Discrimination in Violation of the First Amendment.

1. That the censorship of speech at issue here occurs as a condition on government funding does not alter its invidious nature.

The AFLA requires the withholding of information critical to reproductive choice and encourages the spreading of misinformation in the guise of providing education and health care. By its very terms, then, Section 300z-10 requires viewpoint-based discrimination in

violation of the first amendment:[13] it prohibits AFLA-funded facilities, their professional personnel, and their subcontractors from engaging in activity which advocates, encourages or promotes abortion.[14] Although

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[13] U.S. Const. amend. I.

[14] The AFLA does not prohibit speech which discusses abortion in a pejorative light. Indeed it was understood by one key AFLA administrator that talking about abortion as "killing" was "probably all right." J.A. 93 (Deposition of Sheeran, Director, Division of Program Development and Monitoring, HHS Office of Adolescent Pregnancy Programs)(referencing the AFLA's requirements and how to monitor them). In addition to being viewpoint-based, Section 300z-10's requirement that AFLA grantees avoid all conduct which may "in any way have the effect of facilitating obtaining an abortion" is unconstitutionally vague. When a statute is so vague as to "operate[] to inhibit the exercise of individual freedoms affirmatively protected by the Constitution," it is invalid. Cramp v. Board of Public Instruction, 368 U.S. 278, 288 (1961). Section 300z-10, like the ordinance struck down in Coates v. Cincinnati, 402 U.S. 611 (1971), is unconstitutionally vague because it ". . . subjects the exercise of . . . [a] . . . right to an unascertainable standard, and unconstitutionally broad because it [penalizes] . . . constitutionally protected conduct." Id. at 614.

There is no limit to the type of activity which could fall within the scope of Section

there is no constitutional requirement that Congress create or subsidize programs such as the AFLA program, "the manner in which [HHS] dispenses benefits [pursuant to such programs] is subject to constitutional limitation." Maher v. Roe, 432 U.S. 464, 469-70 (1977). Having undertaken to create a program designed to discourage adolescent sexual activity through sex education and counseling, neither Congress nor HHS can "discriminate invidiously in their subsidies in such a way as to 'ai[m] at the suppression of [what are seen as] dangerous ideas.'" Regan v. Taxation With Representation, 461 U.S. 540, 548 (1983).[15]

300z-10. The presence in a clinic waiting room of a newspaper containing an abortion clinic advertisement or a Yellow Pages containing such advertisements might be deemed to violate this regulation.

[15] See also Cornelius v. NAACP Legal Defense & Educ. Fund Inc., 473 U.S. 778, 811-12 (1985) (exclusion from government benefit that is in fact based on the desire to suppress a particular point of view with which government disagrees is unconstitutional); Big Mama Rag Inc. v. United States, 631 F.2d 1030,

The AFLA does just this in a very cunning way by conditioning government funding on a pledge of silence on the subject of abortion as a medical and personal option.[16] A recipient of AFLA funds is precluded from abortion counseling or referral even where such speech is subsidized by non-AFLA funds. The statute requires further that grantees not subcontract with any organizations that refuse to accede to the AFLA's speech restrictions.[17]

1034 (D.C. Cir. 1980) ("although first amendment activities need not be subsidized by the state, the discriminatory denial of [discretionary benefits] can impermissibly infringe free speech"). The case of Harris v. McRae, 448 U.S. 297 (1980), is not to the contrary. Unlike the right to obtain an abortion at government expense, freedom of expression untrammeled by government censorship in any of its forms has been accorded the highest level of constitutional protection. Carey v. Brown, 447 U.S 445 (1980).

[16] This pledge has of course been an assymetrical one, however, as the DHHS has not interpreted the statute as forbidding speech which condemns abortion. See note 14 supra.

[17] "Grants . . . may be made only to programs . . . which do not provide . . . abortion counseling or referral, or which do

In addition, the requirement that grantees "coordinate, integrate, and provide linkages among providers of care, prevention, and other services for eligible persons," Sec. 300z-3(a)(2),[18] imposes speech restrictions on community service providers who, and information resources that, are drawn into cooperation with the AFLA project. The government's AFLA grants then, do not merely add certain approved messages to an already busy marketplace of ideas; they co-opt and then appropriate the entire marketplace.

In the low-income communities with high

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not subcontract with or make any payment to any person who provides . . . abortion counseling or referral." Sec. 300z-10(a)(emphasis added).

[18] ". . . the purposes of this subchapter are . . . to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents . . . which shall be based upon an assessment of existing programs and, where appropriate, upon efforts to establish better coordination, integration, and linkages among such existing programs . . . " 42 U.S.C. Sec. 300z(b)(3)(emphasis added).

adolescent pregnancy rates that are the explicit targets of the government's "chastity-reinforcement" campaign,[19] the AFLA's restrictions on disfavored information have a particularly insidious effect. The young people and their parents who will be AFLA program participants in these disadvantaged areas have meager educational and health care resources at their disposal[20] and their needs

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[19] "In approving applications for grants . . . the Secretary shall give priority to applicants who -- (1) serve an area where there is a high incidence of adolescent pregnancy; (2) serve an area with a high proportion of low-income families and where the availability of programs of care . . . is low; (3) show . . . the ability to bring together a wide range of needed . . . services[,] . . . a well-integrated network of such services . . . [or] will utilize to the maximum extent feasible existing available programs and facilities such as neighborhood and primary health care centers, . . . agencies serving families, youth, and children . . . [and] maternal and infant health centers . . ." 42 U.S.C. Sec. 300z-4(a)(1)-(4).

[20] As nurse Kim Maisenbacher of St. Margaret's hospital explained, "I believed that my teenage patients could get abortion or contraception information from outside

leave them that much more vulnerable to government-sponsored efforts to steer their behavior. The greater the impoverishment of the community, the more powerful the inducement to relinquish first amendment integrity.[21] By co-opting community networks and

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community resources. Subsequently, I found out this was practically impossible. Many of the teenage TAPP patients are poor, and nearly all are ignorant on how to make use of community resources." J.A. 551 (Maisenbacher Affirmation).

[21] Although such intent does not appear explicitly on the face of the statute, the Committee Report documents the unqualified intentions of the AFLA's proponents that a mechanism should be created through which the speech restrictions can be imposed upon <u>all</u> public benefit programs which the federal government funds, subsidizes, or cooperates with:

> The DHHS has been given the authority under the act to review all programs which provide prevention . . . for pregnant adolescents . . . <u>[T]he Secretary should examine other programs to determine the degree of duplication and philosophical consistency</u> existing in current Federal programs including family planning, welfare and health maintenance programs. To the greatest extent possible there

local service providers, the federally funded AFLA programs -- instead of fostering family and community structures -- may bring about even further erosion of those very institutions.

The government may not, as Congress has done with the AFLA, deny government funding on the ground that a grant applicant has engaged in constitutionally protected activity with sources of funds independent of the government program at issue. In Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983), aff'd in part rev'd in part after remand, 789 F.2d 1348 (9th Cir.), aff'd mem. sub nom. Babbitt v. Planned Parenthood, 107 S. Ct. 391 (1986), for example, this Court summarily affirmed a holding that Arizona may not deny grants to

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> should be consistency in the approaches utilized in new and existing programs that deal with the problems of adolescent sexual activity and pregnancy.

S. Rep. No. 161, 97th Cong., 1st Sess. 16 (1981)(emphasis added).

Planned Parenthood so as to "unreasonably interfere with the right of Planned Parenthood to engage in abortion or abortion-related speech activities" funded by independent sources. Id. at 944.

Similarly, in Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364 (1985), the Court invalidated a government ban on editorializing by radio stations receiving federal grants, in part because the ban would have prohibited a station "from using even wholly private funds to finance editorial activity." Id. at 400. "Where . . . a speaker desires to convey truthful information relevant to important social issues such as family planning and the prevention of venereal disease . . . the first amendment interest served by such speech [is] paramount." Bolger v. Youngs Drug Products Corp., 436 U.S. 60, 69 (1983). The government may not use its pregnancy prevention program to silence grant

applicants who, while working to further the purpose of the Act, also wish to disseminate information about contraception and abortion, particularly when this activity is supported by non-AFLA funds.

2. The AFLA scheme results in government-funded misinformation that is designed to misguide and intimidate adolescents.

The AFLA requires that grantees, systematically and without notice to program participants, withhold information about contraceptives and abortion.[22] The record is clear

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[22] Former Senator Jeremiah Denton, originator and key proponent of the AFLA, faulted prior federal family planning programs on the theory that exposure to accurate medical information regarding abortion and birth control causes increased sexual activity among young men and women. Senator Denton and the bill's co-sponsors presented the AFLA as an alternative to programs funded under Title X of the Public Health Service Act of 1984. They explained that the AFLA demonstration projects were explicitly designed to curb teen access to such information, while simultaneously enlisting religious groups in a state-sponsored effort to urge upon young adults those "moral values" of which Senator Denton and the other sponsors approved. See

that the AFLA has effectively silenced speech essential to reproductive decisionmaking. It has preempted the provision of accurate medical information to health care recipients by physicians, nurses, social workers and educators, rendering them mere agents of state-funded and religious ideology -- ideology which is, moreover, frequently at odds with sound medical practice. Dr. Louis Laz, an obstetrician-gynecologist at AFLA grantee St. Margaret's, described the frequent conflicts he faced between standard ethical

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S. Rep. No. 161, 97th Cong., 1st Sess. (July 21, 1981). See also Examination of the Role of the Federal Government in Birth Control, Abortion Referral, and Sex Education Programs: Hearings Before the Senate Comm. on Labor and Human Resources, 97th Cong., 1st Sess. 3 (Mar. 31, 1981); An Overview of the Adolescent Pregnancy Problem: Hearings Before the Subcomm. on Family and Human Services of the Senate Comm. on Labor and Human Resources, 98th Cong., 2nd Sess. 171 (Apr. 24 and 26, 1984); Consideration of the Reauthorization of Title X of the Public Health Service Act: Hearings Before the Subcomm. on Family and Human Services of the Senate Comm. on Labor and Human Resources, 98th Cong., 2nd Sess. 270, 292 (Apr. 5 and May 1, 1984).

medical practice and the directives of the Catholic hospital:

> The religious directives forbid doctors at St. Margaret's from performing, prescribing, recommending or even referring for sterilization, abortion, or contraception even though these options are critical for the vast majority of obstetrical or gynecological patients . . . . The fetus or embryo is treated as a separate human patient whose treatment often imperils women's health and lives . . . Teenagers are not informed that an abortion is many times safer for them, in terms of risks to their lives, than continued pregnancy and childbirth. Women who have added childbirth risks imposed by cancer, heart problems, extreme obesity, lupus, diabetes, sickle cell disease, mental conditions, hypertension, to name a few, are never informed about abortion which might be medically indicated.

J.A. 527-28 (Laz Affirmation)(emphasis added).[23] Dr. Laz further enumerated several

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[23] The absolute ban on abortion counseling is contrary to the most basic standards of medical ethics which require that doctors discuss with their patients all available medical options and provide all information pertinent to the patient's exercise of informed consent. The total censorship of information about abortion, combined with

examples of distorted information provided by the hospital:

> The curriculum also lists complications and side-effects of the diaphragm, including toxic shock, which has never been proven. There is no association between spermicides, which are used in conjunction with the diaphragm, and the future development of congenital abnormalities . . . . The curriculum is very misleading in that it does not discuss any of the benefits of contraceptives except the benefits of natural family planning, for which no side effects are shown, even though natural family planning is a method that must be used in conjunction with a regular partner, and has never been used successfully with teenagers.

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subsequent pressure to surrender the infant, will coerce choice and subject women to increased medical and psychological risk. See Brief Amici Curiae of the American Public Health Assoc., et al., in Support of Appellees, Point I. See Colautti v. Franklin, 439 U.S. 379 (1979)(standard of care provision requiring physician to employ abortion technique which would most likely result in live fetus struck down as unconstitutionally vague and unduly restrictive of physician's exercise of discretion); Doe v. Bolton, 410 U.S. 179, 192 (1973)(Physician's discretion should be "exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman's age -- relevant to the well-being of the patient.")

Id. at 534-35. Materials used by the Families of the Americas Foundation in its AFLA-funded "Adolescent Sexuality Program" define abortion as "[t]he premeditated killing of an unborn baby in the mother's womb during the period of gestation by artificially inducing the expulsion of the baby so that it does not survive." J.A. 587. In an obvious attempt to intimidate young women, the Foundation furnishes them with a highly misleading list of possible "immediate complications" of early abortions, including

> laceration of cervix, hemorrhage, perforated uterus, laceration of urinary bladder and ureters, air embolism, laceration of bowel, shock, transfusion reactions, laparotomy, hysterectomy, retained tissue, death, cardiac arrest, bronchial obstruction, and anaphylactic shock.

Id. at 587-88. The materials continue with a lengthy list of "Immediate Complications" for late abortions, both saline and hysterotomy, as well as "Delayed Complications" and

"Effects on Later Pregnancy." Id. at 588-89. The materials do not acknowledge that the likelihood of any such complications is minuscule;[24] nor do they list the risks attendant upon childbirth or the greater likelihood that childbearing may cause women, especially adolescent women, permanent health damage.[25] The harm of this misinformation is obvious when assessed in light of the limited access to information in this area, see text and notes pp. 26-30 supra, pp. 39-40 infra, especially for adolescents, see text and notes p. 44 infra.

As one court addressing this very issue

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[24] See Roe v. Wade, 410 U.S. 113, 149 (1973)(the Court took judicial notice of the relative safety of first trimester abortions compared with the statistical health risks of continued pregnancy and childbirth). See also Lebold, Grimes and Cates, Mortality From Abortion and Childbirth: Are the Populations Comparable? 248 J.A.M.A. 188, 191 (1982).

[25] See generally Brief Amici Curiae of American Public Health Assoc. et al., at Point I. B. for a discussion of the medical assessment of risks.

stated, the Constitution "does not permit the state to attempt to persuade women to decide not to terminate their pregnancies by keeping them in ignorance." Planned Parenthood v. Kempiners, 531 F. Supp. 320, 332 (N.D. Ill. 1981), vacated and remanded on other grounds, 700 F.2d 1115 (7th Cir.), aff'd on remand, 568 F. Supp. 1490 (1983). Where, as here, the regulated speech concerns a controversial but protected activity the government's authority to interfere through state-approved ignorance or misinformation is particularly limited. See Carey v. Population Serv. Int'l, 431 U.S. 678, 700 (1977).[26]

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[26] This Court has held that ". . . above all else, the first amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972), quoted in Arkansas Writers' Project v. Ragland, 107 S.Ct. 722, 727 (1987). The government cannot, therefore, discriminate between viewpoints or ideas, nor can it prohibit discussion of an entire topic. Edison Co. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 537 (1980). See Arkansas

The importance of the right to receive ideas[27] was emphasized in the Supreme Court's decision invalidating the removal of certain library books by public school officials. Board of Education, Island Trees Union Free School District v. Pico, 473 U.S. 853 (1982). The Court noted that the right to receive information is a necessary corollary to the writer's right to speak. Id. Here, a govern-

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Writers' Project, 107 S.Ct. at 727; Federal Communications Comm'n v. League of Women Voters, 468 U.S. 364, 384 (1985); Metromedia Inc. v. San Diego, 453 U.S. 490, 518-19 (1981) (plurality opinion). "[T]he state may not, consistently with the spirit of the First Amendment, contract the spectrum of available [medical] knowledge." Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

Regardless of its motive, the government may not choose to further even a legitimate governmental interest "by keeping the public in ignorance of . . . entirely lawful," medical options, such as contraception and abortion. Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 770 (1976).

[27] The right to receive information and ideas uncensored by the government has long been acknowledged by this Court. See Kleindienst v. Mandel, 408 U.S. 753 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Martin v. Struthers, 319 U.S. 141 (1943).

ment gag-order[28] prevents young women and their parents from speaking candidly with educators, counselors, and health practitioners, in order to pursue intelligently a course of action with regard to the young woman's sexual activity, reproductive health, and life decisions.[29] This is most harmful to the young adults whose decision when and whether or not to bear a child is one of the most

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[28] See also Valley Family Planning v. North Dakota, 489 F. Supp. 238, 242 (D.N.D. 1980), aff'd on other grounds, 661 F.2d 99 (8th Cir. 1981). (Citing Carey v. Population Serv. Int'l, 431 U.S. at 700 (state may not completely suppress dissemination of . . . truthful information about entirely lawful activity," quoting Virginia Pharmacy Board, 425 U.S. 748 at 773).

[29] This thwarts the efforts of those attempting to form beliefs about issues which are often debated in the public arena. Cf. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967)(noting protected status of information needed or appropriate for coping with the exigencies of the period); Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

important decisions they may make.[30]

B. The AFLA Unconstitutionally Burdens Young Women's Right of Choice in Matters of Contraception and Reproduction.

The government-funded AFLA program interferes with the fundamental right identified in Roe v. Wade, 410 U.S. 113 (1973), of a woman to choose whether or not to terminate her pregnancy, as well as the correlative right of access to information about contraceptives recognized in Carey v. Population Serv. Int'l, 431 U.S. 678 (1977). U.S. Const. amend. V. This interference is further reinforced by the government's decision to enlist, in pursuit of its purpose, the aid of

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[30] See Thornburgh v. ACOG, 106 S. Ct. 2169, 2185 (1986) ("Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy") Bolger v. Youngs Drugs Products Corp., 463 U.S. 60, 74 n.30 (1983). ("The right to privacy in matters affecting procreation also applies to minors . . . . [and] it cannot go without notice that adolescent children apparently have a pressing need for information about contraception.")

religious organizations that oppose abortion. 42 U.S.C. Sec. 300z-10(a).

1. The AFLA Unconstitutionally Interferes With Informed Consent of Program Participants.

Insofar as the AFLA prescribes a unitary and authoritarian "solution" for all pregnant young women -- that of carrying an embryo to term -- and proscribes the free flow of information about alternative options from medical personnel, it impermissibly usurps the counseling role of the physician, and places a profoundly "chilling effect on the exercise of a constitutional right." Colautti v. Franklin, 439 U.S. 379, 394 (1979). See also City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 472 n.16 (1983)(O'Connor, J., dissenting)(noting that certain "informed consent" provisions which effectively require a physician to parrot state ideology may constitute a first amend-

ment violation.)[31]

In Akron, this Court disparaged the statutory prescription of "a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision." Id. at 445. The Court continued, "It is not disputed that individual counseling should be available for those persons who desire or need it . . . ." Id. at 448 n.38. (emphasis added). See also Colautti v. Franklin, 439 U.S. 379 (1979).

The Court in Akron invalidated an "informed consent" provision requiring the physician to inform the woman, inter alia, that "the unborn child is a human life from the moment of conception" and that "abortion is a major surgical procedure." Akron, 462

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[31] The AFLA's restrictions on abortion speech translate into conditions of employment for AFLA grantee medical personnel. See e.g., J.A. 526, 550.

U.S. at 445. The provision included a list of possible health complications -- a "parade of horribles" -- which the Court characterized as "intended to suggest [the dubious idea] that abortion is a particularly dangerous procedure." Id. This Court invalidated it, noting that the requirements had been "designed not to inform the woman's consent but rather to persuade her to withhold it altogether." Akron, 462 U.S. at 444 (emphasis added). Using similar reasoning, in Planned Parenthood v. Danforth, 428, U.S. 52 (1976), the Court upheld an informed consent provision that it found to encourage accurate and complete counseling, because "the decision to abort . . . is an important, and often stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." Danforth, 428 U.S. at 67 (emphasis added). See also Thornburgh v. ACOG, 106 S. Ct. at 2178.

The invalid Akron provisions are strikingly similar to the instruction prescribed in the AFLA programs -- the very kind of "litany" designed not to inform, but to mislead. Accordingly, the AFLA scheme, which is designed to withhold full knowledge about abortion from program participants, cannot be upheld.

2. The AFLA's Funding Scheme Impermissibly Coerces the Minor's Reproductive Life Decisionmaking.

This Court has previously noted that minors (as well as parents, who are often a primary source of guidance to their children), have an especially acute need for truthful information about sexuality and pregnancy.[32]

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[32] As the Court recognized in Bolger v. Youngs Drug Products Corp., 463 U.S. at 75 n.30, "adolescent children apparently have a pressing need for information about contraception." Thus, the statute at issue in Bolger prohibiting advertising about contraception was struck down because it inhibited the free flow of truthful information and denied adolescents and their parents the ability to discuss birth control and make informed decisions about sex. Id. at 74. Cf.

"[T]he potentially severe detriment facing a pregnant woman . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." Bellotti v. Baird (Bellotti II), 443 U.S. 643 (1979).

The Act's restrictive funding scheme is designed to ensure that at least one of several possible obstacles will ultimately prevent a pregnant adolescent from considering or obtaining an abortion. In the case of those AFLA programs which prohibit any mention of abortion as an alternative to bearing a child, the adolescent will be kept ignorant of that option.[33] In the case of those programs

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Carey, 431 U.S. at 678 (provision prohibiting parents from distributing birth control to children is invalid).

[33] See, e.g., J.A. 484 (Lyon County Health Department's teaching manual states: "Discussion [of abortion] not included because

which do include a discussion of abortion, the presentations are biased so as to steer the teenager into the predetermined course of behavior of carrying to term.[34] Even a

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it is not an option to consider")(emphasis in original); J.A. 553 (Maisenbacher Affirmation)(Pregnant teens are "very ignorant" when they arrive at St. Margaret's Hospital and are "encouraged to become dependent on an institution which will deliberately perpetuate their ignorance by giving only medical procedures and information consistent with Catholic directives"). See also pp. text and notes p. 26 supra.

[34] The program descriptions are filled with seemingly benign language about supplying minors not merely with facts, but with values; when one realizes, however, that "the very purpose of religion is to transmit certain values," J.A. 597 (Simmons Affirmation), it becomes evident that the religious mission of funded groups and the raison d'etre of the AFLA are one and the same. Because of the impermissible fusion of the secular and the religious effected by the Act, good "values" and "accurate" decisions are, under this scheme, synonymous with being a "better Christian" and with living life "as God intended." J.A. 636-37 (excerpts from St. Margaret's curriculum); J.A. 633 ("Sometimes there are good sources of information, but other times the messages may not be accurate or present sexuality as special and important . . . shows we see on television or at the movies are not real life but make-believe and do not present sexuality as God

teenager who is somehow independently aware of abortion (and/or contraception) as an option may be too intimidated to inquire about either, because of the pervasively religious nature of the locale,[35] the presence of clergy performing religious functions or in their traditional garb,[36] the decided preference for childbearing and motherhood reflected in

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intended.")(emphasis in original). See also text and notes pp. 11-15 supra.

[35] For example, St. Margaret's Hospital contains crucifixes and religious symbols and statuaries throughout the buildings and grounds. J.A. 552-53 (Maisenbacher Affirmation); J.A. 485 (AFLA "program at one parochial school and a local Lutheran Church were held in rooms where religious symbols were displayed").

[36] See, e.g., J.A. 568 (Pastor William J. Ingersoll's letter confirms that the addressee of the letter will "meet with the parents and youth" to cover various topics, "followed by a brief presentation by myself of Biblical and theological views regarding sex.") For complete listing of instances in which clergy and/or visibly religious employees were present during orientations or the actual workshops, see R. 155, 61-62 n. 102 (Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment).

program materials,[37] the often inaccurate and inflammatory description of the abortion procedure and its consequences,[38] the similarly inflammatory or inaccurate description of contraceptives,[39] or some combination of

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[37] See, e.g., L.D. 11 (Current grantee Christian Family Care Agency materials advise pregnant woman that abortion "is not the answer to a crisis pregnancy . . . . Deciding to give your baby life is a loving, courageous decision . . ."). See also J.A. 513 (Catholic Family Services AFLA grant application states that "[t]he client will not be counseled to terminate the pregnancy, although caseworkers do discuss a client's feelings about abortion and the detrimental effects abortion can have on the physical and emotional well-being of the client, as well as the destruction occurring to an unborn infant").

[38] See, e.g., pp. 26-29 and n. 14 supra. L.D. 77-78, 86-100 (Current grantee, A Woman's Choice distributes materials with facts and statistics by exaggerating the possibility of remote complications from abortions.)

[39] See, e.g., J.A. 522 (Student Evaluation of AFLA course states: "I don't think they should try to discourage kids from using birth control because the Church says not to. Some kids have made mature decisions and dwelling on what the Church says may give them a guilt trip . . . [the teacher] spent so much time on the natural family planning (rythm method) [sic] as a good thing because the Church approves it but she failed to mention

those factors. The dissemination of misinformation (or failure to provide essential information), in the "care" programs is particularly coercive as it takes place during the limited and stressful time period when a woman is deciding whether or not to continue her pregnancy. But even ir the "prevention" programs -- the teenage sexuality education programs -- the government preempts by hidden force the woman's decisionmaking process through systematic and calculated misinformation as well as other coercive strategies. The magnitude of the government's incursion on this decisionmaking process is all the greater because it affects women who are at a critical juncture in the formation of their personalities and moral development.

By funding such "education" and "care" programs, the AFLA clearly flouts this Court's

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that it is not good for teenagers to use this method -- it's not really safe.") (emphasis added).

frequently stated mandate that government refrain from exerting undue influence, through physicians or otherwise, on a woman's decisionmaking with respect to contraception and abortion. "The states," however, "are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." Thornburgh v. ACOG, 106 S. Ct. at 2178 (1986). Nor may government constitutionally discourage use of contraceptives by hiding or distorting information about them.[40]

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[40] In Carey v. Population Serv. Int'l, 431 U.S. 678, the State of New York sought to justify a statute prohibiting distribution of contraceptives to those under 16 on the basis that the law would deter sexual activity among minors in that age range. This Court flatly rejected such a rationale, taking judicial notice that minors do have sexual relations and with "frequently devastating" consequences. Id. at 695-96. Concurring in part and concurring in the judgment, Justice Stevens pointed out the danger and irrationality of imposing on individuals a rigid ideology that simply ignores reality:

> Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on

If forced ignorance and intimidation fail to keep the teenager from raising the question of abortion, the teenager who requests abortion counseling or referral cannot, by the terms of the statute, receive it unless both of her parents (or guardians) also "request" it. 42 U.S.C. Sec. 300z-10(b). This provision constitutes a further obstacle, which in practice operates, even for the mature and/or emancipated minor, as a parental consent requirement without the alternative avenues constitutionally required. Moreover, if a teenager, unaware of the anti-abortion restriction on funding, requests abortion

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> the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though the State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.

Id. at 715.

services (or any other service, for that matter), the Act requires both notification to and permission of parents or guardians,[41] with only three narrow exceptions. 42 U.S.C. Sec.

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[41] The AFLA is touted as representing an "innovative" approach, depending primarily on "developing strong family values and attitudes of adolescents concerning sexuality and pregnancy . . ." 42 U.S.C. Sec. 300z-(a)(10)(A). When one compares the rhetoric, however, with the actual design of the statute it becomes apparent that family "values and attitudes" receive the government's approval only if they comport with the narrow anti-abortion ideological message which Congress intended to further by the Act. For example, Sec. 300z-5(a)(22)(A)(ii) provides that "in the case of a pregnant unemancipated minor requesting services from the applicant, the applicant will notify the parents or guardians of such minor . . . within a reasonable period of time . . . ." Yet, the Act also specifically prohibits parental notification in the case of a pregnant unemancipated minor if a grantee has reason to suspect that "such parents or guardians are attempting to compel such minor to have an abortion." Sec. 300a-5(a)(22)(C) (emphasis added). This provision is not a neutral one designed to protect the minors' fundamental rights to procreative choice-making free from compulsion. There is no corollary provision in the case of parents attempting to "compel childbearing and/or adoption." Clearly, Congress has determined that parental involvement is desirable only if the parents will further the statute's ideological agenda.

300z-5(22)(A),(B). In the case of abortion, this provision can only serve a punitive purpose, since the AFLA grantee by definition will not, in any event, provide such a service.

3. Given That it Interferes With Privacy Rights, The AFLA is Not Sufficiently Narrowly Tailored to Withstand Constitutional Scrutiny

Each of the barriers to access to or use of contraception built into the statute and manifested in the "prevention" and "care" programs is, independently, far more than a mere expression of policy favoring childbirth over abortion. See Harris v. McRae, 448 U.S. 297, 325 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977). Rather, each acts as an affirmative, state-created obstacle in the path of a woman's right to decide for herself whether or not to bear a child. This right is no less fundamental for minor women than for adult

women.[42] Statutes burdening that right cannot withstand constitutional scrutiny unless they satisfy an "important" state interest, and unless the means are narrowly drawn to serve only that interest. See H.L. v. Matheson, 450 U.S. 398, 413 (1981). The legislative purpose of curtailing adolescent sexual activity may be an important state interest, but the strategy of achieving that purpose by promoting ignorance, fear, guilt and misinformation is not narrowly tailored to serve that

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[42] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (invalidating blanket rule which treats all minors under 15 as too immature to make abortion decision and which denies opportunity to show that abortion is in minor's best interests without parental consent); Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979) (no third party, including parents, may exercise absolute veto power over minor's decision to seek abortion); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (holding unconstitutional statute requiring that unmarried minors under 18 obtain parental consent for abortion).

interest, and indeed defeats that interest.[43] Experts on the subject have long recognized that adolescents do not respond well to moralizing and that the object of any teen pregnancy program must be clarification of an

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[43] The premise of the AFLA is that there is a causal relationship between access to accurate information about contraception and increased promiscuity, and an increase in the rates of pregnancy, abortion and childbirth among teens. One expert on adolescent pregnancy calls this presumed relationship between family planning availability and increased promiscuity "spurious." She writes, "[t]here is no evidence that the availability of family planning services increases sexual activity among female teenagers; however, it does appear to improve contraceptive use and reduce their chances of having an unplanned pregnancy and out-of-wedlock birth.", Hofferth, The Effects of Program and Policies on Adolescent Pregnancy and Childbearing, reprinted in 2 Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing, 225, 260, (Hofferth & Hayes, eds., 1987)(National Research Council publication). Another study found that residence in a southern state was the most important predictor of high adolescent fertility and related that fact to, among other things, the higher proportion of Fundamentalists in that area and to the fact that southern states allot relatively little money to education and welfare and that abortions are less available in the South. Morgan, Interstate Variations in Teen Fertility, 2 Population Res. and Pol'y Rev. 72 (1983).

adolescent's own values. Studies as well as common sense indicate that if adolescents are made to feel guilty about sex, they will shun taking any precautions, since doing so would be tantamount to an admission of sexual activity:

> A conflict exists because the attitude of the adolescent is that sex is all right and the person or situation is right, but the moral code of most parents stipulates that premarital sex is wrong . Behaviorally, however, the adolescent is sexually active. The discrepancy that exists between actual behavior and moral upbringing is often evident in the percentage of adolescents who routinely do not use any type of birth control and are surprised when they become pregnant. The adolescents feel that if they do not use contraception and are swept away on the spur of the moment, then sexual behavior is acceptable. Planning sexual activity conflicts with the moral code of their parents and their own confused beliefs and values.

Tauer, Promoting Effective Decision Making in Sexually Active Adolescents, 18 Nursing Clinics of North America 276 (1983)(footnote omitted). Therefore, despite the government's

legitimate interest in reducing rates of adolescent pregnancy, the approach it has adopted through the AFLA is not likely to instill the sense of responsibility and autonomy in teenagers that many feel is essential to stemming the problem of unwanted teen pregnancy.

The emphasis on bringing out the adolescent's own values is based not only on the abstract ideal of respect for individual conscience,[44] but also on the practical realization that this is the only way for young adults to develop the self respect and self confidence necessary to act responsibly and with an understanding of the consequences of their acts: "The harmony between one's

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[44] The first amendment embodies a promise based on just that "abstract ideal"-- that under the newly-formed constitutional system, the federal government would be required to treat its citizens with respect. See Record Docket Entry 155 (Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment 8-12).

beliefs and one's choices and the realization that the adolescent himself has made the choice will help him to be an active participant in his own health care." Tauer, supra p. at 280. This Court has recognized that the absolute imposition of external values on minors -- whether it be the values of parents, judges, physicians, or religion-- is constitutionally intolerable.[45] It is also a way to ensure minors' dependency and continued ignorance. More than a moral authority, "[t]he adolescent needs a neutral

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[45] In his concurring opinion in Bellotti v. Baird (Bellotti II), 443 U.S. 662 (1979), Justice Stevens noted the constitutional difficulties inherent in the judicial bypass procedure, which required that a judge apply the value-laden standard of "best interests of the minor." This standard was of little guidance, he wrote, because "[the judge's] decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor -- particularly when contrary to her own informed and reasoned decision -- is fundamentally at odds with the privacy rights underlying the constitutional protection afforded to her decision." Bellotti II, 443 U.S at 655-56 (Stevens, J., concurring in judgment).

ally who can help her evaluate the pros and cons of various choices. Such an ally needs to be able to tolerate her ambivalence toward the pregnancy and her relationship to her parents and other significant authority figures." Adler, Sex Roles and Unwanted Pregnancy in Adolescent and Adult Women, 12 Professional Psychology 63 (1981).

The existence of successful programs which encourage teens to abstain from or delay sexual relations, but also counsel on birth control and abortion, should leave no doubt that Congress has not here chosen the least intrusive means for achieving the goal of promoting abstinence among teenagers. For example, "Teen Choice" is a sexuality education and counseling program conducted in seven New York City public schools by Inwood House, a home for unwed mothers. The program "encourages teens to delay having sex," but

> [s]ources for birth control are given when it becomes obvious that

> the girl plans to have sex -- with or without birth control. A similar process takes place if a girl turns to a counselor for advice on an abortion.
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> "Whether we favor it or not is really irrelevant," said Dominique Moyse-Steinberg, a Teen Choice counselor at Brandeis. "What's really important is option counseling [to ensure] that what is done is done of her own free will."

Education Research Group, Teen Pregnancy: Impact on the Schools 50 (R. Weiner ed. 1987) (A Special Report).[46] In sum, by treating

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[46] Tauer echoes the theme of free will and focuses on the importance of treating adolescents as capable, independent moral and intellectual agents:

> If we believe that the only way to promote effective decision-making in adolescents is to help them to understand what is valuable in their own life and to use that as a base for making decisions, then we can no longer spoon-feed information to them. We must take into account the cognitive, social, emotional, and sexual development of adolescents, and only by being aware of them as growing, changing persons will we be able to effectively help them to choose how to live their lives. If their choice is to be sexually active and they are in accord with their beliefs and it is a choice that they have made freely, after

teenagers as morally and intellectually incompetent to make intimate decisions about their lives, the statute makes that harsh judgment a self-fulfilling prophecy.

Moreover, the AFLA is constitutionally defective in its requirement that both parents (or guardians) "request" abortion counseling or referral, in order for the adolescent to receive either. 42 U.S.C. Sec. 300z-10(a). This so-called "exception" is virtually

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> understanding all of the alternatives and accepting the outcome, then we must accept that choice. If their choice is not to be sexually active and is based on their own belief system and is a choice freely made by examining all the alternatives and understanding the outcome, then we must also support that decision. The health professional must strive to help adolescents learn to make decisions based upon their own beliefs and value systems, to guide them to an understanding of where they are in their development, to not moralize or preach; to understand what sexuality means to the adolescent and not merely to emphasize physiological aspects of sex.

Tauer, supra p. 51, at 280.

meaningless in light of the absolute prohibition on funding to groups that in any way countenance abortion.[47] Regardless of what the statute may permit technically, many AFLA-funded health care providers hold anti-abortion beliefs, and thus cannot, in accordance with those beliefs, provide the requested information. Even in the case of an AFLA-funded health care practitioner who may

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[47] See also Sec. 300z-5(22)(A)(i), requiring, subject to certain exceptions, that AFLA grant applicants provide assurances that they will "notify the parents or guardians of any unemancipated minor requesting services . . . [and] will obtain the permission of such parents or guardians with respect to the provision of such services." As for pregnant unemancipated minors requesting services, applicants must provide the additional assurance that parents will be notified "within a reasonable time." Sec. 300z-5(22)(A)(ii). This provision is, quite transparently, designed to deter minors who would prefer not to involve their parents, from requesting certain services, including abortion. Clearly, however, parental involvement is paid lip service only; it is hindered where parents favor the dissemination of honest abortion-related information as such involvement will not further the coercive purposes of the Act. See note 41 supra.

not strictly adhere to anti-abortion strictures, there is no mechanism in the statute to ensure that he or she will be made aware of the exception. See J.A. 550 (Maisenbacher Affirmation).[48]

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[48] Ms. Maisenbacher, a registered nurse formerly employed as a midwife in the AFLA-funded St. Margaret's Teenage Pregnancy Program, noted the inefficacy of the exception which she defined as requiring parental "consent":

> In my employment interview I was told both by Nancy Barrows, director of Nurse-Midwives, and the personnel director, that I would not be able to discuss either abortion or artificial family planning with my patients because to do so would breach the religious tenets of St. Margaret's. I was given a booklet entitled "Ethical and Religious Directives for Catholic Health Facilities", (Exhibit A). It was made clear to me that if the religious rules in this booklet were not followed I could lose my job. Although I understand that the Adolescent Family Life Act permits teenagers to get information and referral for contraceptives with parental consent, and abortion referrals upon parental request, I was not informed of this when I worked at St. Margaret's and it is clear that even providing such limited information would breach the

Moreover, the parental "request" exception, in practice, operates no differently than an unconstitutional parental consent requirement.[49] It represents the last of a series of obstacles set by the Act in the path of a woman attempting to make a personal decision. Minors have a right of access to information directly affecting their reproductive lives. Carey v. Population Serv.

> hospital rules as explained to me.

Id. at 550. (emphasis added).

[49] H.L. v. Matheson, 450 U.S 398 (1980), is not to the contrary. The statute upheld in that case required parental notice only "if possible," and the Court made clear that the Utah statute did not grant parents veto power over the minor's abortion decision, which would have been constitutionally impermissible. Id. at 411. The AFLA's vague "request" provisions, however, apparently require parents to come forward and, either orally or in writing, state an interest in receiving information about abortion. Obviously, parents would not do so unless they might approve of an eventual abortion. Moreover, the Matheson Court did not extend its holding to mature or emancipated minors, or to immature minors who could demonstrate that notification would be detrimental to their best interests. Id. at 406-07 n.14.

Int'l, 431 U.S. 678. Insofar as access to information is a prerequisite to the ability to obtain an abortion, the parental "request" requirement violates the well-established principle that where government requires parental consent to the minor's abortion decision, it "must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." City of Akron, 462 U.S. at 439-40.[50]

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[50] See Bellotti II, 443 U.S. at 644 (explaining that the judicial by-pass procedure would provide an alternative to parental consent whereby a minor would have an "effective opportunity" to secure an abortion with anonymity); Carey v. Pop. Serv. Int'l, 462 U.S. at 688-89 (holding that the right of access to contraceptives "is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in Griswold, Eisenstadt v. Baird, and Roe v. Wade"). See also Bolger v. Youngs Drug Products Corp., 463 U.S. at 69 (holding that the first amendment prohibits government from

The deliberate withholding of vital and accurate information about contraception and abortion required by the AFLA constitutes a state-created obstacle in the path of a woman's right to make her own reproductive life decision. Enforced ignorance is at least as formidable an obstacle in that path as criminal penalties (Roe); spousal consent requirements (Danforth); parental consent

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inhibiting the flow of truthful information where that information "relates to activity which is protected from unwarranted state interference").

It is immaterial that the AFLA does not bar all available channels through which adolescents may learn about abortion. The Constitution forbids government to exceed certain limits defined by this Court. It simply does not matter for constitutional purposes whether that limit has been exceeded partially or thoroughly. As this Court once explained in a slightly different context, "one is not to have the exercise of his liberty . . . abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 63 (1939). See also Carey, 431 U.S. at 697 (1977) ("less than total restrictions on access to contraceptives that significantly burden the right to decide whether or not to bear children must also pass constitutional scrutiny").

requirements amounting to veto power (Bellotti I);[51] second-trimester hospitalization requirements (Akron); and distorted informed consent provisions (Akron, Thornburgh). The concerted effort of government and religion to impose one preferred set of values on young women operates as a subtle but profound veto on individual autonomy and self-determination.

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[51] Bellotti v. Baird, (Bellotti I), 428 U.S> 132 (1976).

CONCLUSION

This Court should affirm the district court judgment on establishment clause, free speech and privacy grounds and modify the order to strike down the AFLA in its entirety as unconstitutional.

Respectfully Submitted,

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Counsel of record and amici curiae acknowledge and thank Jennifer C. Pizer, New York University Law School, J.D. 1987; Doreena Wong, New York University Law School, J.D. 1987; Anne Zinkin, New York University Law School, J.D. degree expected 1988; Lisa Swanson, Lyn McCoy and Lynn Thorp.

APPENDICES

APPENDIX A

Letters of Consent to the Filing of

the Brief Amici Curiae

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

February 1, 1988

Jennifer C. Pizer, Esquire
Legal & Research Director
National Abortion Rights
Action League
1101 14th Street, N.W., 5th Floor
Washington, D.C. 20005

Re: Bowen v. Kendrick, et al.
Nos. 87-253, 87-431, 87-462 and 87-775

Dear Ms. Pizer:

With regard to your letter of January 25, 1988, I hereby consent to the filing of an amicus brief in the above case on behalf of the NOW Legal Defense & Education Fund, the National Abortion Rights Action League, and possibly other organizations.

Sincerely,

Charles Fried

Charles Fried
Solicitor General

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

REPRODUCTIVE FREEDOM PROJECT

132 West 43 Street
New York, NY 10036
(212) 944-9800

Janet Benshoof
DIRECTOR

Lynn M. Paltrow
Rachael N. Pine
STAFF COUNSEL

Dana Traub
PARALEGAL
PUBLIC EDUCATION

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

February 8, 1988

Jenny Pizer
Legal & Research Director
N A R A L
1101 14th Street, N.W.
5th floor
Washington, D.C. 20005

re: Bowen v. Kendrick
87-253, 87-432,
87-462, 87-775

Dear Ms. Pizer:

Pursuant to your request, Cross-Appellants Chan Kendrick et al., herein consent to the filing of a brief amicus curiae in the above-captioned case by the NOW Legal Defense & Education Fund, the National Abortion Rights Action League, and such other groups as may wish to join.

Sincerely,

Janet Benshoof
Attorney for Cross-Appellants

JB/hs

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

February 1, 1988

Ms. Jennifer C. Pizer
Legal & Research Director
NARAL
1101 14th Street, N.W., 5th Floor
Washington, DC 20005

Dear Ms. Pizer:

On behalf of United Families of America, I am happy to give my consent to your filing an amicus curiae brief in Bowen v. Kendrick and the consolidated cases, Nos. 87-253, 87-431, 87-462, and 87-775.

Very truly yours,

Michael W. McConnell
Assistant Professor of Law
Counsel of record, United
Families of America

APPENDIX B

Interest of Amici Curiae

INTEREST OF AMICI CURIAE

The NCW Legal Defense and Education Fund (NOW LDEF) is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination, secure equal rights, and preserve reproductive options under law.

The National Abortion Rights Action League (NARAL) is a national organization with more than 200,000 members in 34 state affiliates and the national organization. Because NARAL believes that reproductive self-determination is central to the lives and health of women, NARAL educates the public and policymakers about the importance of creating social conditions that allow women to exercise freely the full range of their reproductive choices.

The American Association of University Women, a national organization of over 150,000 women and men, is strongly committed to achieving legal, social, and economic equity for women. AAUW supports basic constitutional rights for all persons, including first amendment rights of free speech and separation of church and state, the right to privacy, and equal protection under the law. The right to reproductive choice continues to be a priority issue for AAUW.

The American Humanist Association is a non-profit national educational organization of persons in every state of the Humanist philosophy. The AHA strongly supports freedom of conscience and the principle of separation of church and state. The AHA believes that the AFLA violates both the establishment clause and the right to privacy protected by the fourteenth amendment.

Americans for Religious Liberty is a nation-wide, non-profit, educational public interest organization dedicated to defending religious liberty, freedom of conscience, and the constitutional principle of separation of church and state. ARL believes that the AFLA violates the establishment clause by providing tax support to sectarian institutions and violates the privacy rights of intended beneficiaries by providing them with distorted information.

The Black Women's Agenda is a private non-profit organization which aims to improve the status of black women and their families. The BWA is interested in Bowen v. Kendrick because of AFLA's impact on low-income black girls and their access to information consistent with reproductive freedom.

B'nai B'rith Women, Inc., founded in 1897, is a non-profit charitable, religious, and educational organization of over 125,000 women. Among its purposes, as reflected in its bylaws, is to "give guidance to youth on the broadest principles of humanity." It has implemented that purpose through a specific program designed to meet the rise of teenage pregnancies through educational programs for parents and adolescents.

The Center for Law and Social Policy is a public interest law firm which provides representation to women, minorities, the disabled, and the poor on issues of family law and policy. Our work has confirmed that teen pregnancy can have especially devastating consequences for poor teenagers and lead to economically insecure families. In light of this reality, a crucial component of any rational family planning policy must be the preservation of service providers' flexibility to offer counseling to pregnant teenagers that gives them the ability to make informed choices best suited to their circumstances.

The Committee to Defend Reproductive Rights is a San Francisco, community-based organization with 1,000 members throughout California and several other states. For ten years, CDRR has been dedicated to insuring women's reproductive freedom by engaging in public education issues concerning reproductive rights. CDRR supports and defends the reproductive right and freedom of all women, including young women.

Equal Rights Advocates, Inc. is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society.

The National Emergency Civil Liberties Committee is a non-profit organization, dedicated to the preservation and extension of civil liberties and civil rights. Founded in 1951, it has brought numerous actions in the federal courts to vindicate constitutional rights. Through its educational work, it likewise has sought to preserve our liberties. From time to time, the NECLC submits amicus curiae briefs to the Court when it believes issues of particular import to civil liberties are at stake.

The National Organization for Women (NOW) is a national membership organization of approximately 150,000 women and men in about 700 chpaters throughout the country. It is a

leading advocate of women's equality in all areas of life. NOW has as one of its priorities the preservation of the right to reproductive freedom, including abortion.

The National Women's Health Network serves as an advocate for women whose voices are not heard in the creation of health policies at the federal level. Given that young women's health education needs were to be a goal of this federal program, the National Women's Health Network wishes to voice its concern that young women's needs be truly met and not encumbered by religious teachings.

The National Women's Political Caucus is a non-profit corporation supporting the election and appointment of women to public office. It also supports legislative and public policy issues of concern to women, such as freedom of choice an reproductive rights, the Equal Rights Amendment and economic and legal equity for women.

The Northwest Women's Law Center is a private, non-profit organization in Seattle, Washington, that works to advance the legal rights of women by means of litigation, education, and providing information and referral. Protecting women's freedom of reproductive choice is one of the Law Center's priority issue areas. The Law Center has participated in several cases involving reproductive rights before the U.S. Supreme Court.

The United States Student Association is a student advocacy service, representing over 3 million students and over 400 universities and colleges around the United States. USSA is in favor of a woman's right to choose and of reproductive freedom because an unwanted pregnancy can restrict a woman's access to higher education.

Voters for Choice is the only national, independent pro-choice political action committee. Voters for Choice works directly with campaigns, providing both contributions and vital technical assistance to candidates in dealing with reproductive rights issues.

The Women's Law Project is a non-profit feminist law firm dedicated to advancing the status and opportunities of women through public education, litigation, advocacy and research. The WLP has played a leading role in defending reproductive rights in the courts, including representing plaintiff women and medical providers in Thornburgh v. ACOG, ____ U. S. ____, 106 S.Ct. 2168 (1986).

The Women's Legal Defense Fund is a tax-exempt non-profit membership organization founded in 1971 to challenge sex-based discrimination and to advance women's concerns through the legal system. WLDF has worked extensively on issues of reproductive freedom.

Zero Population Growth is a national non-profit, membership organization that works to mobilize broad public support for population stabilization both in the U.S. and worldwide. ZPG supports laws and social practices that ensure access for all women to voluntary family planning services as well as medically safe and affordable abortion services.

APPENDIX C

Certificate of Service by Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have caused three copies of the foregoing Brief of Amici Curiae NOW Legal Defense and Education Fund, et al., together with a copy of the Lodged Documents referenced therein at note 2, to be served by first class mail postage prepaid upon:

Counsel of Record for Appellant Bowen
Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Counsel of Record for
United Families of America
Michael W. McConnell
University of Chicago Law School
1111 East 60th Street
Chicago, Illinois 60637

Counsel of Record for
Chan Kendrick, et al.
Janet Benshoof
ACLU-Reproductive Freedom Project
132 West 43rd Street
New York, New York 10036

on or before February 13, 1988.

s/
Sarah E. Burns
Counsel of Record for Amici Curiae
NOW Legal Defense and
Education Fund, et al.

APPENDIX D

Index to Lodged Documents

INDEX TO LODGED DOCUMENTS